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In the Supreme Court of the United States

OCTOBER TERM, 1959.

No. 440.

THE AMERICAN SECURIT COMPANY,
Petitioner,

vs.

SHATTERPROOF GLASS CORPORATION,
Respondent.

BRIEF FOR RESPONDENT
In Opposition to Petition for a Writ of Certiorari.

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FOREWORD.

The "questions presented" by the petition do not arise out of the record of this case and do not present, with accuracy, brevity, and clearness, the matters essential to a ready and adequate understanding of the case. On this ground alone, the Court has sufficient reason to deny the petition (Court Rule 23, subparagraph 4).

RESPONDENT'S STATEMENT OF THE CASE.

This case started as an ordinary patent infringement action in which petitioner charged respondent with infringement of four patents. The complaint was filed in the Delaware Court on March 7, 1955 and the Answer was filed May 10, 1955. In the answer, respondent alleged as its first defense misuse of the patents in suit by mandatory

package licensing practices (R. 35a)* and as its second defense violation of the terms of the Toledo Decree (R. 36a).

On July 25, 1955 respondent filed a petition in the Ohio Court in which it applied to the Ohio Court under the provisions of the Toledo Decree for determination of a reasonable royalty for the patents in suit in Delaware and for an order requiring petitioner to comply with the terms of the Toledo Decree (R. 19b).

On September 14, 1955 petitioner filed a motion in the Delaware Court to restrain respondent from proceeding in the Ohio Court (R. 86a). On October 6, 1955, on application of the United States of America, acting through its attorneys by direction of the Attorney General, the Ohio Court entered an order directing petitioner to appear and show cause why it should not be permanently enjoined from taking any action in the Delaware Court to prevent respondent from exercising the rights conferred on it by the Toledo Decree (R. 90a). On the same day, that is, October 6, 1955, the United States filed a paper in the Delaware Court entitled "Representation of the Interest of the United States" in which it requested the Delaware Court to suspend action in Delaware pending a hearing and determination of matters in Ohio (R. 87a). In an order dated October 10, 1955 (R. 89a), the Delaware Court adopted the suggestion of the United States and suspended proceedings in Delaware pending termination of the proceedings in the Ohio Court.

The order to show cause was heard by the Ohio Court on October 19, 1955 (R. 95a-138a). At the conclusion of the hearing, the Ohio Court rendered an oral opinion dis-

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* References to the petition for a writ of certiorari are "Pet. 1." References to the Appellant's Appendix in th Court below are "R. 1a" and to Appellee's Appendix are "R. 1b."

missing the order to show cause and stating that the Court would not accept jurisdiction of respondent's petition under the circumstances (R. 148a-149a). On December 13, 1955 a written order was entered by the Ohio Court in which it dismissed the petition of the United States and declined to accept jurisdiction of the petition of respondent (R. 92a).

Thereafter, the action proceeded in Delaware. Respondent's motion for summary judgment dismissing counts I-IV of the complaint was filed December 26, 1956 and granted July 19, 1957 (164a-177a). Respondent's motion to dismiss counts V and VI of the complaint on the grounds that they did not state a cause of action was filed February 20, 1957 (R. 14a, docket entry 123). A hearing was held on this motion on September 11, 1958 and the motion was granted in an opinion dated September 22, 1958 (R. 225a). These two motions disposed of every count in the complaint.

On July 9, 1958 petitioner filed a petition in the Ohio Court for construction of the Toledo Decree (R. 186a-203a). Acting on this petition the Ohio Court entered an order on August 19, 1958 directing the United States, Hamilton Glass Company and respondent to show cause why petitioner's petition to the Ohio Court should not be granted. A hearing was had on this order on September 16, 1958. The Ohio Court rendered an oral opinion (R. 251a-253a) and handed down a written "Order Construing Final Judgment" on September 29, 1958 (R. 254a-260a). Simple inspection will show the Ohio Court's written order of September 29, 1958 (R. 254a-260a) is materially different from the proposed order incorporated in petitioner's petition to the Ohio Court (R. 198a-203a). The "Order Construing Final Judgment" of the Ohio

Court dated September 29, 1958 was prepared by counsel for petitioner (R. 22b).

At the time of the hearing held in the Ohio Court on September 16, 1958 and thereafter petitioner was under the injunction of the Delaware Court not to try to obtain any finding, as against respondent, in conflict with the summary judgment opinion of the Delaware Court (R. 211a-222a).

Respondent did not participate in the hearing held before the Ohio Court on September 16, 1958; but, instead, merely appeared and presented the Ohio Court with a copy of the injunction of the Delaware Court (R. 245a).

ARGUMENT.

The Questions Presented In This Action.

The questions presented in this action are whether it constitutes patent misuse and violation of the terms of the Toledo Decree for petitioner to license its patents as a package only, to refuse to license less than the package, and to refuse to license its patents separately and individually. In other words, the questions are whether mandatory package licensing, as opposed to voluntary package licensing, constitutes patent misuse and a violation of the terms of the Toledo Decree. These are the principal questions decided by the Court of Appeals for the Third Circuit and to which it specifically addressed itself (Pet. 40).

The Patent Package.

The patents involved in the patent package are listed in Schedule A of the standard license form of petitioner (R. 63a). The package originally consisted of over forty patents. The patents in the package have been expiring

regularly so that the package, at this writing, consists of nine unexpired patents.

Conclusions of the Courts Below.

Both the District Court and Appellate Court concluded that there was no doubt that petitioner has followed a mandatory package licensing policy (R. 170a, 172a, Pet. 41). Both the District Court and Appellate Court concluded that there was no genuine issue as to the material facts and that summary judgment procedure under Rule 56 was proper (R. 164a, Pet. 46). Both the District Court and the Appellate Court concluded that petitioner's mandatory package licensing policy constituted a misuse of the patents in suit (R. 172a, Pet. 45) and a violation of the Toledo Decree (R. 175a, Pet. 46).

Significant Errors and Omissions of Petitioner's "Statement."

Petitioner's "Statement" is in error in that respondent never, in the Ohio Court, requested relief under the consent decree from petitioner's charges of infringement (Pet. 8). Respondent's petition to the Ohio Court appears in the Brief and Appendix of Appellee and is self-explanatory (R. 19b-21b). In its petition filed July 25, 1955 in the Ohio Court, respondent invoked the Toledo Decree and asked the Ohio Court to determine a reasonable royalty for the patents in suit in Delaware and to order petitioner to comply with the terms of the Toledo Decree (R. 19b-21b).

Petitioner's "Statement" also omits a most significant fact with respect to the early relationship between the Ohio and Delaware Courts, which is that on September 14, 1955 petitioner filed a motion in the Delaware Court to restrain respondent from proceeding in the Ohio Court

(R. 86a, 213a). The representation of interest of the United States in the Delaware Court, order to show cause of the Ohio Court, and the hearing of October 19, 1955 in the Ohio Court were the direct result of petitioner's September 14, 1955 motion in the Delaware Court. In that motion, petitioner argued that the Delaware Court had jurisdiction to the exclusion of the Ohio Court because of prior institution of the infringement action in the Delaware Court (R. 86a, 213a). Petitioner is now arguing the reverse proposition before this Court (Pet. 23 and 24). Petitioner's present position is thus diametrically opposite to the position taken by it in the motion filed September 14, 1955 in the Delaware Court.

The Questions Presented in Subgroup I.

Petitioner has presented a total of sixteen questions which are divided into three subgroups under Roman numerals I, II and III.

The questions of subgroup I are identified as "Relating to patent misuse in general," which is a correct title because these questions do not relate to this case. The heart of the misuse question resides in the mandatory or compulsory nature of petitioner's patent licensing policy. None of the first four questions presented specifies that the designated licensing policy is mandatory, as opposed to voluntary, and, therefore, none of them arises out of this case or properly defines the issue before the Court.

The Questions Presented in Subgroup II.

There are eight questions in subgroup II and they purportedly relate to consent decrees. The first question of this subgroup is whether it is the duty of the infringement court, which in this case is the Delaware Court, to

refer the question of violation of the antitrust decree to the court which entered the decree, which in this case is the Ohio Court. In effect, the Delaware Court did just this. It suspended proceedings and gave the Ohio Court an opportunity to pass on this very question as presented in respondent's petition to the Ohio Court (R. 19b-21b). However, the Ohio Court declined to accept jurisdiction of the matter (R. 92a, 93a). The error, if any, was made by the Ohio Court in declining to take jurisdiction. There is no action of the Delaware Court of which petitioner can complain.

The second question is whether one District Court has jurisdiction to rule that a party to an antitrust decree in another District Court has violated that decree. There is no conflict as to this matter. The Delaware District Court (R. 174a), the Court of Appeals for the Third Circuit (Pet. 46-47), the Court of Appeals for the Seventh Circuit (254 F. 2d at p. 895) and the Ohio Court (R. 248a) each answered this question in the affirmative. They all agreed that each court had jurisdiction to interpret the Toledo Decree.

The third question does not arise out of this record. The United States did not petition the anti-trust court to enjoin the patent owner from suing the infringer. The United States petitioned the anti-trust court to enjoin the patent owner from preventing respondent from exercising the rights conferred on it by the Toledo Decree (R. 90a). The Ohio Court declined to accept jurisdiction and the infringement action then proceeded in the Delaware Court (R. 92a).

The fourth question omits the critical fact circumstance of the case which is that the Delaware Court gave the Ohio Court the first opportunity to interpret the

Toledo Decree, but the Ohio Court declined to accept jurisdiction and exercise this opportunity (R. 92a). The Delaware Court then proceeded to interpret the Toledo Decree. The Ohio Court did not interpret the Decree until long after the Delaware Court had rendered its opinion, even though it had been given the first opportunity to do so. There was no outstanding ruling of the Ohio Court capable of binding the Delaware Court when the Delaware Court rendered its opinion. If petitioner proposes that the Delaware Court was bound to reverse itself after the ruling of the Ohio Court, then the question should so state.

The fifth and sixth questions, in substance, relate back to the first question and require no separate discussion.

The seventh question does not arise out of the record of this case. There is no problem with respect to the type of license which petitioner "declined" to offer.

The scope of the eighth question is very limited and does not arise out of the record of this case. The District Court and Court of Appeals below found that petitioner's mandatory package licensing policy constituted a violation of the Toledo Decree. Whether the mere issuance of petitioner's standard form license to a voluntary licensee constituted a violation of the Toledo Decree was not passed upon.

The Questions Presented In Subgroup III.

The questions of subgroup III purportedly relate to summary judgment. The first question in this subgroup, however, is a paraphrase of the first question in the patent misuse subgroup. Like the first question of the patent misuse subgroup, it omits the key fact that petitioner's package licensing policy is mandatory and not voluntary.

The second question in this subgroup parallels the first except that it relates to the Toledo Decree. It also omits the key fact that petitioner's package licensing policy is mandatory and not voluntary.

The third question in this subgroup does not arise out of the record before the Court. Both the District Court and the Court of Appeals found that petitioner's policy was to refuse to license less than all of its patents (R. 170a, 172a, 173a, 221a, and Pet. 41). Of petitioner's licensing policy, the Court of Appeals said:

> "No genuine issue of material fact lurks in this phase of the case." (Pet. 41.)

The fourth question is the only question in this subgroup which really relates to summary judgment matters. The question presupposes that the Court of Appeals for the Third Circuit and the Seventh Circuit each considered the same material, which is not the fact. Much of the material before the Court below was not before either the Court of Appeals for the Seventh Circuit or the Ohio Court. Moreover, the Court of Appeals for the Seventh Circuit specifically excluded some of the material before the lower courts (254 F. 2d at p. 893).

1. No Conflict With Decisions of This Court.

Petitioner contends that the decisions of the Delaware Court and the Court of Appeals for the Third Circuit are in conflict with *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U. S. 637 (1947) and *Automatic Radio Mfg. Co., Inc. v. Hazeltine Research, Inc.*, 339 U. S. 827 (1950) (Pet. 13).

In *United States v. Paramount Pictures, Inc., et al.*, 334 U. S. 131 (1948), the same argument was presented that petitioner now presents with respect to the *Trans-*

parent-Wrap case. In answer to this argument, the Court said:

> "It is argued that Transparent-Wrap Mach. Corp. v. Stokes & S. Co., 329 U. S. 637, 91 L. ed. 563, 67 S. Ct. 610, points to a contrary result. That case held that the inclusion in a patent license of a condition requiring the licensee to assign improvement patents was not per se illegal. But that decision, confined to improvement patents, was greatly influenced by the federal statute governing assignments of patents. It therefore has no controlling significance here." (334 U. S. at p. 159.)

The *Hazeltine* case did not relate to mandatory package licensing and the Court specifically made note of this point. It said:

> "We are aware that petitioner asserted in its counter motion for summary judgment in the District Court that Hazeltine refused to grant a license under any one or more of its patents to anyone who refused to take a license under all. This averment was elaborated in the affidavit of petitioner's attorney in support of the motion. The point was not pressed in the Court of Appeals or here. In any event there is nothing available in the record to support the averment, since the affidavit in support thereof was made upon information and belief and the relevant portion, at least, does not comply with Rule 56(e) of the Federal Rules of Civil Procedure." (339 U. S. at p. 831.)

2. No Conflict With Decisions of the Fourth and Seventh Circuits.

Petitioner also argues that the decisions of the Delaware Court and Court of Appeals for the Third Circuit are in conflict with decisions of the Courts of Appeals for the Fourth and Seventh Circuits (Pet. 17).

The Baker-Cammack Hosiery Mills, Inc. v. Davis Co. case, 181 F. 2d 550 (4th Cir. 1950) did not pass on mandatory package licensing. The plaintiff originally followed a mandatory package licensing policy but before suit was filed and after protest by defendants, changed this policy and offered defendants an entirely different form of license. The Court of Appeals for the Fourth Circuit took note of this fact and decided the case on the basis of the last license offer of plaintiff. It did not pass on validity of the original mandatory package licensing policy. The Court said:

> "In considering this aspect of the matter it is important to bear in mind that much of the defendants' argument relates to the original licenses offered to the trade which were materially changed in 1948. We think that the case should be decided on the basis of the last offer, for even if the first offer was improper, the plaintiff was clearly within its rights in withdrawing and correcting it." (181 F. 2d at p. 571.)

In *Hazeltine Research v. Avco Manufacturing Corp.*, 227 F. 2d 137 (7th Cir. 1955), the defendant set up a defense that plaintiff followed a mandatory package licensing policy. The Court of Appeals for the Seventh Circuit, however, held that the evidence did not support the defendant's allegations. (227 F. 2d at p. 149.)

The same situation occurred in *Apex Electrical Mfg. Co. v. Altofer Bros. Co.*, 238 F. 2d 867 (7th Cir. 1956). The Court of Appeals for the Seventh Circuit held that the evidence did not support the defendant's allegations and that the plaintiff was not guilty of misuse of the patents in suit by block-booking. In doing so, the Court of Appeals for the Seventh Circuit made specific reference to *Hazeltine Research v. Avco Manufacturing Corp.* (238 F. 2d at p. 872.)

In the case of *Hazeltine Research, Inc. v. Admiral Corporation*, 183 F. 2d 953 (7th Cir. 1950), the question of mandatory package licensing was not presented. The case was presented on the same evidence as that before the Supreme Court in *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U. S. 827 (1950). There was no evidence of mandatory package licensing and the question was not passed on.

3. Decision of District Court of Ohio.

The decision of the Ohio District Court interpreting the Toledo Decree was prepared in toto by counsel for petitioner (R. 22b). On September 16, 1958, when the question was argued before the Ohio Court, and thereafter, petitioner was under an injunction of the Delaware Court not to seek any finding in the Ohio Court, as against respondent, in conflict with the decision of the Delaware Court (R. 211a-222a, and 245a). If there is a conflict between the decision of the Ohio District Court and the Delaware Court, as petitioner argues, then it is quite clear that petitioner appears in this Court admittedly in contempt of the injunction of the Delaware Court.

The decision of the Ohio Court in fact constituted a modification of the Toledo Decree as opposed to a mere interpretation of it and petitioner so conceded during the argument of its cause before the Ohio Court (R. 23b, 24b). Thus the Third Circuit interpreted one Decree and the Ohio District Court interpreted a second modified Decree and there is no conflict because the respective Courts did not interpret the same Decree.

The term "modification" is used with the meaning given it by this Court in the case of *Hughes v. United States*, 342 U. S. 353 (1952).

4. No Conflict With Decision Of Seventh Circuit On Summary Judgment.

There is no conflict between the decisions of the Courts of Appeals for the Third and Seventh Circuits with respect to summary judgment procedure because the material before the Third Circuit was not before the Seventh Circuit and because different defendants were involved in these decisions, respondent being the defendant in the Third Circuit and Hamilton Glass Company being the defendant in the Seventh Circuit.

In the Seventh Circuit, defendant Hamilton Glass Company introduced the deposition of Robert Ingouf and certain exhibits included therein which had been taken in this action in the Third Circuit. In granting summary judgment for Hamilton Glass Corporation, the District Court for the Southern District of Indiana, Terre Haute Division, relied in part on this material. The Court of Appeals for the Seventh Circuit held that this material should not have been considered and reversed the decision of the Indiana District Court (254 F. 2d at p. 893).

It is thus apparent that the record before the Third Circuit was materially different from the record before the Seventh Circuit and there is no conflict.

With respect to summary judgment procedure, it should be noted that the party opposing a motion for summary judgment should call the Court's attention to the presence of genuine issues of material fact and make a showing, through affidavits or otherwise, which rebuts the showing made by the moving party. There is no affidavit or other showing in this case that petitioner's patent licensing policy is anything other than what it is represented to be by respondent.

Petitioner had ample opportunity to challenge respondent's showing by a contrary showing but failed to do

so. The summary judgment decision of the Delaware Court was handed down after extensive briefs and a full hearing. Subsequent to the decision of the Delaware Court, petitioner filed two motions for rehearing (R. 15a, 16a, docket entries 135 and 147). The first motion was denied by the judge who rendered the original decision (R. 16a, docket entry 144) and the second motion was denied by another judge (R. 18a, docket entry 163).

Petitioner is confusing the question by numerous references to material not considered by the lower Court. Of importance is what the lower Court considered and found, not what it did not consider and fail to find. Courts must act on the material before them and cannot operate in a vacuum. If there were a genuine issue as to any material fact, petitioner should have raised it. Having neglected to raise any such issues, the clear inference is that there are none and that the showing made by respondent truly reflects the material facts of this case.

There is no conflict with the decision of the Court of Appeals and no abuse of the summary judgment procedure.

5. No Conflict On Proposition That Courts Have Concurrent Jurisdiction Of Antitrust Decrees.

Under point 5 (Pet. 22-27), petitioner raises two propositions which it says should be determined by this Court.

Initially and with respect to jurisdiction, respondent has previously shown on page 7 of this brief that the Courts which this proceeding has touched are in unanimous agreement that every District Court has jurisdiction to construe the Toledo Decree if the matter is brought before it. Thus there is no conflict between the various Courts on this proposition.

Of equal importance is the fact that this Court has already considered and passed on this question in *United States Gypsum Co. v. United States*, 352 U. S. 457 (1957) which is referred to in petitioner's brief (Pet. 23). In the *United States Gypsum* case, this Court obviously recognized the jurisdiction of the Iowa Court to pass on the misuse and antitrust matters and directed its attention to questions of discretion and judicial procedure. This Court said:

> "We think it *appropriate* that these issues should be tried and disposed of by the antitrust court rather than the Iowa Court, * * *" (352 U. S. at p. 476, emphasis supplied.)

This Court has thus already passed on point 5(a) (Pet. 22) and found in the negative with respect to it.

As to point 5(b), the question answers itself. As a matter of comity, a Court in one circuit presumably gives great weight to a decision of a Court in another circuit but it certainly is not bound by it. Any other conclusion results in ridiculous legal situations. In the instant case, respondent gave the Ohio Court the first opportunity to construe the Toledo Decree when it petitioned that Court in July of 1955 (R. 19b). The Ohio Court declined to accept jurisdiction of the matter (R. 92a). Later on and after the Delaware Court had construed the decree, the Ohio Court also construed the Decree (R. 254a-260a). Assuming arguendo that this construction of the Ohio Court is in conflict with construction of the Delaware Court, the Delaware Court was certainly not bound to reverse itself and the Ohio District Court is certainly not a Court of Appeals in antitrust matters for the Delaware District Court.

6. Analysis of Decision Below Not Correct.

Under Point 6, petitioner argues that this Court should determine whether it is per se a patent misuse for the owner of a group of patents to charge the same royalty for use of some as for all of its patents (Pet. 27). The lower Court did not pass on this question. In the absence of decisions below, there is no reason for this Court to pass on the question.

The Courts below were satisfied that petitioner never offered to license less than the package for the same royalty rate as the package. Petitioner's Vice-President Ingouf stated on cross-examination that this was not petitioner's policy (R. 12b). The correspondence leading up to the license between petitioner and Eagle Convex Glass Specialty Company shows the same thing. Eagle Convex asked for a license under one patent (R. 15b) but was told that petitioner would not issue licenses under individual patents and so had to take a license under the package, which it did (R. 16b).

Petitioner's analysis of the essence of the decision below is simply not correct.

7. Instant Case Is Unique.

Under point 7, petitioner argues that the Court should determine whether package licensing is a violation of the standard provisions in many antitrust decrees (Pet. 28).

There is nothing in the record to indicate that the provisions of the Toledo Decree are standard or, if they are, how many other decrees incorporate these provisions and pose a package licensing question. Respondent doubts that any other party to a consent decree which incorporates licensing provisions identical to those of the Toledo Decree would be so presumptuous as to follow a

mandatory package licensing policy. The instant case is unique and its circumstances do not lend themselves to any sort of broad policy pronouncements.

CONCLUSION.

Petitioner seeks certiorari for sixteen questions. In the event that the Court grants the writ, respondent respectfully requests that the Court specify the questions to be considered.

Respondent submits that the writ should be denied because the questions presented do not reflect the opinion below and because petitioner has not established error in the Court below.

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